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May 21, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Joint Petition of BellSouth, SBC, and Verizon, CC Docket No. 96-98*

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, NewSouth Communications, by its counsel, hereby gives notice that it sent the attached letter, via hand delivery, to Common Carrier Bureau Chief Dorothy Attwood today.

Very truly yours,

Michael H. Pryor

MHP:crl
Enclosure

WDC 213655v1

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May 21, 2001

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Attwood:

On May 7, 2001, BellSouth Corporation, SBC Communications, Inc., and the Verizon Telephone Companies ("Petitioners") filed an opposition ("Opposition") to NewSouth Communications' motion to dismiss the petition to eliminate mandatory unbundling of high capacity loops and dedicated transport ("Joint Petition"). NewSouth, by its counsel, herein responds to the Petitioners' arguments. Petitioners' Opposition provides no basis to deny NewSouth's motion to dismiss. The Commission should grant NewSouth's motion before the industry expends further resources preparing to respond to the Joint Petition.

The Opposition Provides No Basis for Ignoring Commission Precedent Establishing a Three-Year Quiet Period

In their Opposition, the Petitioners contend that the Commission did not really establish a three-year quiet period, and if it did, it was acting unlawfully. Neither argument has any merit. In order to promote a measure of certainty in the market, the Commission stated it would not entertain *ad hoc* petitions to remove unbundled network elements ("UNEs") from the national list. Instead, it would review the "national list of elements that are subject to unbundling obligations of the Act every three years."[1/] The Commission established a "three-year time frame for reevaluating unbundling obligations" and stated it would revisit its "rules in three years." The Commission could not have been more clear in establishing a three-year quiet period.

1/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), ("UNE Remand Order"), ¶ 151.

Petitioners contend, nonetheless, that the Commission did not foreclose the possibility that it might find that particular UNEs are no longer subject to unbundling before the three-year date. As support for this contention, Petitioners cite language from the UNE Remand Order to the effect that it would be difficult for the Commission to predict when incumbent local exchange carriers ("ILECs") would no longer be subject to unbundling obligations.[2/] This statement, however, was made in the context of rejecting a mandatory sunset of unbundling obligations, and provides no basis for ignoring the Commission's three-year review procedure.

Nor is the Commission's three-year quiet period unlawful. Petitioners contend that the Commission cannot continue to require unbundling of elements that do not meet the impair standard reflected in section 251(d)(2) of the Act. There is nothing in section 251(d)(2), however, that precludes the Commission, having applied the impair standard "[i]n determining what network elements should be made available,"[3/] from establishing an orderly procedure to reexamine that determination on a regular and periodic -- as opposed to an *ad hoc* -- basis.[4/] Petitioner's contention that the three-year quiet period violates Congress's requirement that the Commission perform a biennial review of its regulations is equally unavailing. As the Commission noted, it may begin its review after approximately two years of experience so that it can be completed in three-year intervals.[5/] There is nothing inconsistent with the timing of review under the biennial review procedure and the periodic review established in the UNE Remand Order. Additionally, Petitioners' contention that the three-year quiet period is unlawful rings hollow in light of their failure to challenge this aspect of the UNE Remand Order on reconsideration.[6/] Having been confronted with their blatant failure to follow Commission precedent, Petitioners resort to belated and unmeritorious attacks on the precedent's legality.

Finally, Petitioners contend that dismissal of their petition could preclude the Commission from deciding the issue raised in the Fourth Further Notice of Proposed Rulemaking. The issue raised in that proceeding is whether ILECs could decline to provide combinations of unbundled loop and transport elements (*i.e.*, enhanced extended loops or "EELs") solely for the provision of exchange access service.[7/] With respect to that question, the Commission has sought comment on whether a separate impairment analysis for the exchange access market may be required.[8/] The Commission, however, did not suggest that the

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2/ Opposition at 2 (citing UNE Remand Order, ¶ 152).

3/ 47 U.S.C. § 252(d)(2).

4/ *See, e.g., FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (Section 154(j) of the Communications Act empowers the Commission to conduct its proceedings in such manner "as will best conduce to the proper dispatch of business and the ends of justice.")

5/ UNE Remand Order, ¶ 151, n.269.

6/ Both BellSouth and Verizon (then Bell Atlantic) filed petitions for reconsideration and/or clarification. Neither petition raised any challenge to the three-year quiet period. See, BellSouth Petition for Reconsideration/Clarification, CC Docket 96-98 (Feb. 17, 2000); Bell Atlantic Petition for Reconsideration and Clarification, CC Docket 96-98 (Feb. 17, 2000).

7/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587, ¶ 3 (2000) (Supplemental Order Clarification).

8/ *See* Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service, CC Docket No. 96-98, DA 01-169 (Jan. 24, 2001).

impairment analysis for high capacity loops and dedicated transport undertaken in the UNE Remand Order should be revisited. The Petitioners fail to explain why resolution of the narrow question of whether carriers would be impaired in the provision of special access services for exchange access without access to EELs justifies the submission of a petition, in clear violation of Commission precedent, to remove unbundling obligations for *all* high capacity loops and *all* dedicated transport in every market for every telecommunications service. A sufficient record can be developed in the Fourth Further NPRM proceeding to address the conversion issue without having to also find that all high capacity loops and all dedicated transport should be removed from the unbundling obligation. Additionally, to the extent there is overlap between the Fourth Further NPRM and the Joint Petition, the issues will be addressed in the Fourth NPRM and dismissal of the Joint Petition will not prejudice the Petitioners. Conversely, failure to dismiss the petition will prejudice those in the industry that relied on the three-year quiet period and will now be required to compile responses to the broader issues raised in the Joint Petition.

The Petitioners have proffered no justification for ignoring the Commission's precedent in establishing the three-year quiet period. Granting NewSouth's motion to dismiss is the appropriate response.[9/] Granting the motion will affirm the integrity of the Commission's precedent, and reaffirm that the Commission intends to review unbundling obligations in an orderly, fair, and predictable manner. Competing carriers have already obtained investments from the capital markets based on the market certainty that the Commission created in establishing the three-year quiet period. Eliminating that market certainty would further chill the already tight capital markets. Moreover, in the absence of granting the motion expeditiously, the industry will be compelled to expend time and precious resources to marshal evidence in response to the Petitioners' flawed arguments.

The Petition Is Procedurally Defective

NewSouth's motion explained that the petition was also defective because it sought to repeal a rule without following the notice and comment procedures set forth in the Commission's rules. Citing section 1.412(c) of the Commission's rules, the Petitioners argue that the Commission may dispense with the standard rulemaking procedure in this instance because it is unnecessary and it would be in the public interest to do so. Petitioners claim that a rulemaking is unnecessary because the joint petition is discrete, clear and contains sufficient facts.[10/] Petitioners' argument, however, boils down to a claim that they have met the requirements for filing a petition to initiate a rulemaking – not dispensing with it.[11/] Petitioners' argument that it would be in the public interest to dispense with a notice of proposed rulemaking is also flawed. It is premised on their conviction that they will ultimately prevail on the merits, and that it would

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9/ *See* 47 C.F.R. § 1.401(e).

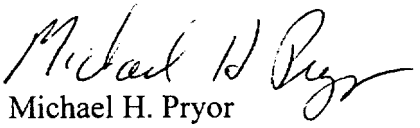
10/ Petitioners also assert that a notice of proposed rulemaking is unnecessary because the joint petition is closely related to the issues being considered in the Fourth Further NPRM. This argument is addressed above.

11/ *See* 47 C.F.R. § 1.401(c) ("The petition [for rulemaking] shall set forth the text or substance of the . . . rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner shall be affected.").

be inconvenient to comply with the rulemaking process before reaching their desired result. Opposition at 4 ("the delay inherent in a two-step process would be inimical to the public interest" because "ILECs would be compelled to continue providing these UNEs . . . even though the statutory standard for mandating unbundling is not met.") Of course that merely begs the question. Petitioners' conviction that they will prevail in the end is no basis for dispensing with the process. For these reasons, Petitioners reliance on the exception for rulemaking in section 1.412(c), even if they had asserted it in their petition, which they did not, is unavailing.

Finally, Petitioners contend that the Commission can grant the relief requested without a rulemaking by considering the petition to be a waiver or a request for forbearance. The Joint Petition, however, requests neither form of relief, and none of the requisite showings for either a waiver or forbearance have been attempted, much less made. The Joint Petition is procedurally flawed and should be dismissed promptly.

Very truly yours,



Michael H. Pryor

MHP:crl

cc: Glenn Reynolds
Michelle Carey
Jodie Donovan-May
Kyle Dixon
Jordan Goldstein
Sam Feder
Sarah Whitesell
Janice Myles

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